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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRITTANY P., a Minor, etc.

Plaintiff and Appellant,

v.

SWEETWATER UNION HIGH SCHOOL  
DISTRICT,

Defendant and Respondent.

D053932

(Super. Ct. No. GIC877257)

APPEAL from a judgment of the Superior Court of San Diego County, John S.  
Meyer, Judge. Affirmed.

Plaintiff Brittany P., alleging she was sexually assaulted by a fellow student (Michael) during a bus trip to school, sought damages from defendant Sweetwater Union High School District (SUHSD) under theories of negligent supervision and negligence per se. The jury found against Brittany P. On appeal, Brittany P. asserts the trial court erred by (1) excluding certain details of Michael's disciplinary record, (2) admitting

evidence concerning Brittany P.'s sexual conduct, and (3) denying Brittany P.'s motion for leave to add the bus driver as an additional defendant.

## I

### FACTUAL BACKGROUND

#### A. Brittany P. and Michael

Brittany P. and Michael had been friends since the eighth grade. In the 10th grade, Brittany P. and Michael both rode the morning school bus to school at Otay Ranch High School, but rode different buses home in the afternoon. At no time during the 10th grade did Michael touch or attempt to touch her inappropriately.

Brittany P. has mild retardation, with a reported IQ of 55, and has suffered from a bipolar disorder since she was a small child. Because of her mental handicaps, Brittany P. required an "Individualized Education Plan" to meet her special needs. She went to and from school on SUHSD's Special Education Bus. Her mental condition causes her to have trouble sequencing and remembering events, and often causes her to mix up events. Her mental disorder has manifested itself in numerous other ways, including being oppositional, argumentative, destructive, temperamental, and having delays and difficulties with her memory; she also had demonstrated traits of being manipulative and of making false suicide attempts.

Michael also rode SUHSD's Special Education Bus to school. He was not physically handicapped or mentally retarded, but suffered from an impulse control disorder and took special education classes. In November of his 10th grade year, he was

transferred from Eastlake High School to Otay Ranch High School because of behavioral problems.

Shortly after he began taking classes at Otay Ranch High School, Michael had an argument with another student and, as a result of that argument, entered into a "behavior contract" with the school district that resulted in an aide riding the bus with Michael to monitor his behavior. The aide rode the bus for approximately four months, until approximately March or April 2005.

#### B. The Disputed Incident

Prior to January 20, 2006, Brittany P. and Michael had a "nice friendship" and engaged in mutual flirting behavior that Brittany P. described as merely "laughing and then pushing each other" and was "nothing really serious until January 20th." Although Brittany P. testified to several incidents (prior to January 20, 2006) she characterized at trial as sexual harassment by Michael, and testified she had complained to the bus driver (Mr. Martinez) but he had ignored her or said "you need to handle that," she admitted at trial that she would be smiling during these mutual pushing episodes and never told Michael he had "gone over the line" during these prior events.

Brittany P. claimed that, on January 20, 2006, while the bus stopped to pick up a student in a wheelchair, Michael touched her inappropriately. The bus driver, who was outside helping a wheelchair student board the bus, did not see the alleged touching but only noticed Brittany P. seemed more subdued than usual afterward. When Brittany P. arrived at school, she told a friend (Elisa) about the incident, and Elisa told her that Michael had molested Brittany P. Elisa brought Brittany P. to a teacher, told the teacher

Brittany P. had been molested, and the teacher contacted Brittany P.'s mother. After Brittany P. spoke with her mother and a school official (Mr. Lizarraga), and Brittany P.'s mother asked the police be involved, Officer Carrillo came to the school to interview Brittany P. Carrillo subsequently interviewed Michael and Damian Duarte, and obtained a written statement from the bus driver, Martinez.

Brittany P. told Carillo she and Michael rode the bus together in the mornings, she liked Michael, and that they engaged in mutual flirting (involving hugging and other physical contact) on an ongoing basis. Brittany P. told Carillo the January 20 incident occurred when the bus driver left the bus to assist wheelchair students, and began when she playfully slugged Michael in the arm. Brittany P. told Carillo Michael had kissed her breast but, in response to Carillo's follow-up questions, revealed Michael had leaned over and made kissing noises approximately two inches below her collarbone, and Brittany P. stated she did not know whether his lips actually made contact with her clothing. Brittany P. also told Carillo Michael kissed her buttocks over her clothing after she had bent over, and Brittany P. at trial admitted that Michael had kissed her buttocks in response to her taunt of "Kiss my ass" or "Kiss my butt." Carillo also asked about prior incidents involving physical contact between Brittany P. and Michael and, while Brittany P. described several incidents to Carrillo,<sup>1</sup> she did not state the bus driver was aware of these contacts.

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<sup>1</sup> In one incident, she and Michael were playing during a wheelchair stop and Michael pushed her down and sat on top of her; Brittany P. said she yelled at the bus driver to tell Michael to get off, but wasn't sure if the driver heard her. In a second

Carrillo's interview with Michael largely confirmed the events described by Brittany P. Michael told Carrillo that he and Brittany P. liked each other and had engaged in flirting and horseplay prior to January 20.<sup>2</sup> When Michael described the January 20 incident, he confirmed he had put his head on her shoulder and made kissing noises but did not kiss her breast, and that he kissed her buttocks over her clothes after she had bent over and told him to do so.

During Carrillo's interview, Brittany P. never characterized Michael's conduct as a molestation. Carrillo did not believe the conduct involved a molestation, and instead believed the action involved two teenagers flirting with one another and that the flirting had gotten out of hand. However, Brittany P.'s mother pushed for Carrillo to arrest Michael and filled out a citizen's arrest form, and also insisted Michael be removed from school. On January 27, SUHSD suspended Michael.<sup>3</sup>

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incident, Michael pulled her off her seat onto him, but Brittany P. was not able to state whether the bus driver was on the bus when that happened. In a third incident, also during a wheelchair stop, Michael approached her and grabbed her buttocks, but Brittany P. was giggling at the time. In another incident, Michael tried to stick his finger up her skirt but she backed up and no contact was made; again, Brittany P. was unable to state that she had complained to the driver about this incident.

<sup>2</sup> The horseplay included sitting on each other's laps, poking each other, Brittany P. pinching Michael's buttocks, and Michael slapping her buttocks. This play, which involved them both laughing or giggling, occurred while the bus driver was off the bus, and Brittany P. never complained to the bus driver that Michael had inappropriately touched her.

<sup>3</sup> The suspension report listed sexual battery as the reason for the suspension. However, Mr. Lizarraga (the vice principal who conducted the investigation leading to the suspension) took notes of the allegations and, in his notes, stated "[p]ossibility of it not being true, exaggerated." The suspension occurred without the benefit of the

The bus driver, Martinez, provided a statement as part of the school's investigation: he did not witness any inappropriate behavior on January 20, and had never heard any complaints from Brittany P. about alleged inappropriate touching by Michael. At trial, Martinez reaffirmed he had never witnessed any inappropriate behavior by Michael toward Brittany P., and she never complained about alleged inappropriate touching by Michael.<sup>4</sup> Michael, as well as another student on the morning bus, confirmed Brittany P. had never complained to Martinez about alleged inappropriate touching by Michael.<sup>5</sup>

Brittany P.'s evidence of damages, allegedly caused by Michael's conduct of touching her inappropriately prior to and through the January 20 incident, was that she was required to undergo counseling, missed school days, missed after-school activities,

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information obtained by Officer Carrillo, and was based primarily on the information given to him by Brittany P.'s mother, who spoke for Brittany P. as to what had occurred on the bus and during earlier incidents. Although Lizarraga also received a statement from a school aide (Mr. Duarte) stating Duarte witnessed a different incident in which a boy allegedly had sexually harassed Brittany P., and Lizarraga assumed that boy was Michael, Duarte's statement (1) did not identify Michael as the boy and instead identified the boy as a general education student rather than a special education student; (2) it apparently involved an incident on the afternoon bus (which Michael did not ride), and (3) at trial Duarte stated Michael was *not* the boy he had seen interacting with Brittany P.

<sup>4</sup> Martinez's statement indicated that Brittany P. and Michael sat across from each other and engaged in horseplay, but shortly before the winter break Michael had changed seats and no longer sat near Brittany P. Martinez stated Brittany P. told him she had a crush on Michael and "questioned why [Michael] was ignoring her," but that Michael had moved back to a seat across from her a week earlier and they had resumed their flirtatious behavior.

<sup>5</sup> The plaintiffs produced two students to provide contrary evidence, but there was ample reason for the jury to disregard their testimony.

suffered emotional distress, and no longer socialized with her friends. Brittany P. also claimed Michael's conduct led her to engage in destructive behavior at home and to twice attempt suicide.

## II

### PROCEDURAL BACKGROUND

#### A. The Lawsuit

Brittany P.'s mother, acting as guardian ad litem, filed an action on her behalf against SUHSD alleging claims for negligent supervision and negligence per se. The jury found, and judgment was entered, in favor of SUHSD. This appeal followed.

#### B. The Disputed Rulings

Brittany P. asserts the trial court committed error in three distinct areas. First, she asserts it was prejudicial error to exclude certain details of Michael's disciplinary record. Second, she argues the court improperly admitted evidence concerning her sexual conduct. Finally, she asserts it was error to deny her motion, made shortly before trial, for leave to add bus driver Martinez as an additional defendant.

## III

### ANALYSIS

#### A. The Ruling on Michael's Prior Acts and Disciplinary Record

Brittany P. asserts it was an abuse of discretion for the trial court to exclude certain details of Michael's prior misconduct and disciplinary record, and that the error was prejudicial.

### *The In Limine Motion and Ruling*

Brittany P. sought to introduce evidence that, 14 months prior to his alleged sexual assault on her, Michael engaged in different sexual misconduct and other disorderly behavior while riding on an afternoon school bus. A witness (Ms. Hughes-Rivera) was at home when she heard noise and commotion outside. She went to investigate, and saw a school bus in front of her house. There were several students screaming obscenities at each other, and one male appeared to be threatening the other children. When Hughes-Rivera told one of the children (a neighbor child) to get off the bus, the male verbally abused Hughes-Rivera.<sup>6</sup> Hughes-Rivera confronted the bus driver and demanded the driver do something, but when the bus driver demurred (saying "[n]othing I can do"), Rivera replied, "Then I will" and turned to go back to her house. As she was leaving, the abusive youth shouted out again and said, "Hey, you bitch. This is for you," and when Hughes-Rivera looked back, she saw him pull down his pants and expose his penis, then turn and "moon" her by pressing his buttocks up against the window in her direction. Hughes-Rivera reported the incident to SUHSD. Michael was subsequently suspended for two days for his role in the bus altercation.

SUHSD moved to exclude Hughes-Rivera's testimony, arguing (1) neither she nor anyone else present during the November 2004 incident could identify Michael as the person who exposed himself to Hughes-Rivera, and (2) her physical description of the

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<sup>6</sup> The male told Hughes-Rivera to "[s]hut up you f---ing white bitch. This is none of your business" and, when Hughes-Rivera replied "[e]xcuse me?" the male said, "You heard me, bitch. Shut up. Get the f--- out of here. Go back in your house and leave us alone."



abusive man was that he was slender and "didn't look like a high school football player," in contrast to Michael's build as a "large individual who could be mistaken for [a] lineman on a football team." SUHSD also moved to exclude any reference to prior disciplinary actions against Michael. Brittany P. opposed the motions, asserting SUHSD suspended Michael because he had engaged in verbal abuse and sexual misconduct (e.g. because he had flashed an adult)<sup>7</sup> and the evidence was relevant to showing SUHSD was on notice that additional protective measures were necessary to prevent assaults by Michael.

After extensive discussions, the court excluded Hughes-Rivera's testimony, as well as any reference to the suspension, under Evidence Code section 352. However, the court permitted Brittany P. to introduce evidence that (1) Michael had entered into a behavior contract with SUHSD, (2) SUHSD placed an aide on Michael's bus to provide a safe and secure environment for the students, and (3) the aide understood he had been placed on Michael's bus to monitor the students' behavior after Michael and another student had become embroiled in an argument.

### *Standard of Review*

A decision to admit or exclude evidence pursuant to a motion in limine is reviewed under the deferential abuse of discretion standard. (*Piedra v. Dugan* (2004))

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<sup>7</sup> Although the computer printout relating to the suspension provided that Michael was suspended after a bus referral for "verb[al] abus[e] to [another] stu[dent] & flashed adult," the assistant principal who investigated the incident stated in her deposition that the bus driver did not see Michael flash anyone. The assistant principal was not convinced Michael had flashed anyone, but did believe he had been involved in a verbally abusive altercation on the bus and was therefore suspended.

123 Cal.App.4th 1483, 1493.) We may find error only if, viewing the facts most favorably to the ruling, we conclude the decision was " 'outside the bounds of reason.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 370-371.)

### *Evaluation*

We conclude the court did not abuse its discretion by excluding the evidence proffered by Brittany P. First, absent some foundational showing that the individual who cursed at and exposed himself to Hughes-Rivera was Michael, her testimony would be entirely irrelevant. (Evid. Code, § 402.) We cannot conclude the court's ruling was so " 'outside the bounds of reason' " (*People v. Kipp, supra*, 18 Cal.4th at pp. 370-371) to constitute an abuse of discretion because Hughes-Rivera did not identify Michael as the person who exposed himself, her physical description of the abusive man was apparently inconsistent with Michael's build, and the bus driver denied seeing Michael expose himself. Additionally, even disregarding Brittany P.'s insufficient foundational showing, the court exercised its discretion under Evidence Code section 352 to exclude the evidence based on its limited probative value (because it did not involve a sexual fondling of another student but instead involved defiance of adult authority through offensive behavior) and the minimal value was outweighed by its potentially prejudicial effect (because the comments to Hughes-Rivera had racial overtones) and of confusing the issues. On this record, we cannot conclude the rulings were an abuse of discretion.

### B. Evidence of Brittany P.'s Social Relationships and Activities

Brittany P. argues the court violated Evidence Code sections 783 and 1106 by admitting evidence concerning her sexual conduct. Brittany P. contends SUHSD was

allowed to (1) question her mother about Brittany P.'s relationship with a boyfriend, dating, and playing spin the bottle, and (2) question her counselor about Brittany P. taking birth control medications and kissing another female student.

Although California circumscribes the use of evidence of sexual conduct by a plaintiff in a civil case, we are convinced there was no error here. At trial, Brittany P. sought damages for the emotional distress she suffered as a result of the alleged January 20 incident and her mother testified that, among other manifestations of the distress, Brittany P.'s behavior changed. Her mother testified (on direct examination by Brittany P.'s counsel) that, prior to January 20, 2006, Brittany P. was social and participated in school activities with friends (including dances and sporting events), and also enjoyed going to the mall and to movies with friends, but that those activities "for the most part . . . ceased" after January 20. As additional quantifiable damages, Brittany P. also sought to recover the costs "for the counseling and medications required as a result of this incident . . . ." At trial, Brittany P. supported this aspect of her claim by calling Ms. Perry, a licensed clinical social worker from whom Brittany P. received counseling services prior to the incident and continuing for several months after the incident. Brittany P. used Ms. Perry's testimony to establish Brittany P.'s post-January 20 visits were necessitated by the problems associated with Michael's alleged attack on her, and she also introduced Ms. Perry's notes from her counseling sessions to buttress that opinion.

The evidence about which Brittany P. now complains arose directly from SUHSD's cross-examination to undermine her claims of damages. For example, to

impeach Brittany P.'s mother's portrayal of Brittany P. as depressed and withdrawn and no longer socializing after January 20, SUHSD counsel elicited Brittany P.'s mother's admission that Brittany P. had a boyfriend in March 2006 and that she had gone on a field trip to a mall in March 2006 at which time she was socializing with other minors by playing spin the bottle. Even assuming this line of questioning was not within the intended ambit of Evidence Code section 1106's exceptions,<sup>8</sup> Brittany P. cites no authority suggesting claims of emotional distress damages may not be attacked by cross-examination seeking to undermine those claims, and the cases are to the contrary. (Cf. *Rider v. Superior Court* (1988) 199 Cal.App.3d 278, 283 [reviewing numerous decisions allowing inquiry into otherwise private matters because the "desire to keep one's sexual conduct private yields to ' "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings" ' "].)

Brittany P.'s remaining claim--that SUHSD was improperly permitted to question her counselor about Brittany P. taking birth control medications and kissing another female student--is even less meritorious. Brittany P. asserted below, and acknowledges

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<sup>8</sup> We question whether Evidence Code section 1106 supports Brittany P.'s argument. That section prohibits evidence as to the plaintiff's sexual conduct to prove consent by the plaintiff, or to prove the absence of injury to the plaintiff "*unless the injury alleged by the plaintiff is in the nature of loss of consortium.*" (*Id.*, subd. (a).) The emotional distress claimed here appears to qualify under that exception. (Cf. *Mercury Ins. Co. v. Ayala* (2004) 116 Cal.App.4th 1198, 1204 [although loss of consortium may have physical consequences, it is principally a form of mental suffering].) Moreover, even absent that exception, Evidence Code 1106, subdivision (c) appears to allow impeachment evidence when the plaintiff has raised the issue, and Brittany P.'s mother's testimony (that Brittany P. was socially withdrawn) appears to permit impeachment evidence under subdivision (c).

on appeal, that she sought "damages in the form of payment for treatment performed by Ms. Perry" necessitated by the problems she experienced from the alleged molestation by Michael. As part of her showing of damages, Brittany P. elicited Perry's opinion that Brittany P.'s post-January 20 visits were necessitated by the problems associated with Michael's alleged molestation, and Brittany P. introduced Perry's notes from the counseling sessions as additional evidence supporting her opinion. However, SUHSD impeached Perry's opinion by showing that at least one of those post-January 20 visits were *necessitated by problems unrelated* to Michael's alleged attack on Brittany P., and used Perry's notes (introduced by Brittany P. as evidence she received counseling associated with the molestation) to show Perry had *instead* listed (as the "new problem" and "major issue discussed") that (1) Brittany P. had been "involved with a boy at [a] friend's house," (2) Brittany P. had been caught by her mother "making out" with a female friend, and (3) that health issues and birth control was discussed. For reasons analogous to those discussed above, we are unconvinced (and Brittany P. cites no authority suggesting) that claims for out-of-pocket expenses allegedly caused by tortious conduct may not be attacked by cross-examination seeking to show those expenses were attributable to other causes. Moreover, because the offending information was *contained in an exhibit proffered by Brittany P.*, any alleged error in permitting the jury to learn that information was invited. (Cf. *Gjurich v. Fieg* (1913) 164 Cal. 429, 433.)

### C. The Order Denying Leave to Amend

Brittany P. asserts the trial court abused its discretion by denying her motion for leave to amend to name the bus driver, Martinez, as an additional defendant.

### *Background*

Brittany P.'s original complaint named Martinez as a defendant. However, in February 2007, Brittany P. filed her amended complaint that effectively dismissed Martinez, but cautioned that the dismissal was without prejudice to renaming Martinez if Brittany P. developed evidence supporting a punitive damages claim.

Trial was originally scheduled to begin on January 18, 2008. On November 20, 2007, Brittany P. filed a motion for leave to amend, which was scheduled for hearing on December 14, 2007, alleging she had recently discovered additional facts demonstrating Martinez acted with malice and oppression, and asked for leave to "name Mr. Jose Martinez and request punitive damages against the same." SUHSD opposed the motion, arguing (1) the facts on which Brittany P. premised her motion were not new because the cited facts were known to her before she dismissed Martinez from the action 10 months earlier; (2) the amendment would cause substantial prejudice to both Martinez (because he would be required to hire independent counsel) and SUHSD (by requiring the trial to be delayed for many months), and (3) the proposed amendment would presumably not state a viable claim.<sup>9</sup> The court denied the motion because it concluded (1) the facts involving conduct toward Brittany P. were not newly discovered, (2) Brittany P. had not demonstrated she had a viable claim against Martinez, and (3) both Martinez and SUHSD would be unduly prejudiced if the motion was granted.

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<sup>9</sup> It appears, from our review of the record, that Brittany P. did not file a proposed amended complaint in connection with the motion, and does not articulate how the existing causes of action (for negligence and negligent supervision) would support a punitive damages recovery.

### *Standard of Review*

Code of Civil Procedure section 473, subdivision (a)(1), provides in pertinent part: "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party. . . . The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars . . . ." Similarly, Code of Civil Procedure section 576 provides that a court "at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading . . . ."

It is well established that "California courts have 'a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others.' [Citation.] Indeed, 'it is a rare case in which "a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case." ' [Citation.]" (*Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158. Absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564.)

However, " '[l]eave to amend a complaint is thus entrusted to the sound discretion of the trial court. " . . . The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. *More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court.* Thus, even if the reviewing court might

have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record. " ' [Citations.]" (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242, italics added by *Branick*.)

### *Analysis*

We conclude the trial court acted within its discretion to reject Brittany P.'s request to amend her complaint and add Martinez as a defendant. First, the court rejected Brittany P.'s claim that her amendment was based on newly discovered facts. The new facts cited by Brittany P. were evidence from Charles M. (a student on the bus) and Mr. Duarte (a school employee).<sup>10</sup> As to Charles M., Brittany P. alleged she learned (in October 2007) that he witnessed the January 20, 2006, incident, he claimed Martinez saw the incident but ignored it, and he claimed Martinez would actively "egg on" misconduct on the bus. The second alleged new fact was that Brittany P. learned (on May 1, 2007) Duarte had seen another incident on the bus involving Brittany P. that Martinez allegedly ignored.<sup>11</sup> However, the court concluded these were not new facts that would support a

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<sup>10</sup> In her opening brief, Brittany P. refers to a third set of new facts. She claims that in October 2007 she "became aware" of additional facts showing malice and oppression by Martinez, because Brittany P. learned "two other handicapped students independently confirmed Michael . . . assaulted [Brittany P.] on the bus on numerous occasions, [Martinez] was aware Michael . . . assaulted handicapped students on the bus, and at times Martinez participated in the verbal harassment." Brittany P. has provided this court with no reference to the record of where either the allegations or the date of discovery might be found, and we therefore disregard them. (*Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1560-1561.)

<sup>11</sup> In the proceedings below, Brittany P. alleged Duarte observed her "being molested by a boy on the bus approximately 2 weeks prior," Duarte "identified this individual to the [p]olice" as Michael, and Brittany P. "report[ed] the assault to the bus driver."



punitive damages claim against Martinez, and there is substantial evidence to support that conclusion. SUHSD submitted evidence supporting the conclusion Brittany P. was aware Charles M. had been present on the bus when the alleged January 20, 2006, incident occurred (and that Brittany P.'s mother had spoken with the parents of other students on the bus immediately following the incident), and Brittany P. was also aware Charles M. had complained of Martinez's acts and omissions *before* Brittany P. agreed to dismiss Martinez from the action. The only fact that became known to Brittany P. *after* she dismissed Martinez was Duarte's report, but that report had no relevance to the specific instance at issue in the present action because (contrary to Brittany P.'s claim on appeal) it did not involve misbehavior by Michael. Moreover, Duarte's report was at best equivocal because it apparently involved a report of mutual "horseplay" *while Martinez was not present* and, when Martinez was informed of what had occurred, Martinez did *not* ignore the conduct but instead "made it clear to both students to quit it . . . ."

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However, the evidentiary support for those claims provides incomplete support for Brittany P.'s characterization. First, Duarte's report to the school did state that a student "put his hands on [Brittany P.'s] rear" and Duarte told the boy to stop, but Duarte's report also noted these students had been engaged in "constant horseplay . . . one minute they are both laughing it off, I see them high five each other, like playing a game and the next thing I see she is violated and disrespected." Duarte also reported these events occurred while the bus driver was out of the bus assisting wheelchair lift students, and that when Brittany P. complained to the bus driver, the bus driver "made it clear to both students to [cut] it out." However, the record does *not* support Brittany P.'s claim that this incident involved Michael: Brittany P. does not identify where in the record Duarte allegedly told police Michael was the boy; Duarte's deposition testimony stated this prior incident occurred in the afternoon (when Michael was not a passenger with Brittany P.); and Duarte's description of the youth (as a slim Caucasian) apparently was inconsistent with Michael's physical characteristics.

The court secondarily rejected Brittany P.'s request to amend because it concluded she had not demonstrated these new facts gave rise to a viable punitive damages claim against Martinez. The facts provided by Charles M. were already known to Brittany P. when she decided her claim against Martinez was *not* viable, and the new facts provided by Duarte were that Martinez took corrective action when he became aware of horseplay on the bus. Although Brittany P. claimed Duarte's evidence provided grounds for a punitive damages claim against Martinez, Brittany P. did not file a proposed amended complaint in connection with the motion for leave to amend stating a new theory of recovery, and she does not articulate how the existing causes of action (for negligence and negligent supervision) would support a punitive damages recovery. We apply the abuse of discretion standard to whether a trial court should have granted a party leave to amend. (*California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 278, disapproved on other grounds by *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 407, fn. 11.)

The courts have recognized, in other contexts, that it is an abuse of discretion to deny a party leave to amend his or her complaint if there is a reasonable possibility the amendment can state a viable claim. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) However, to demonstrate an abuse of discretion, the burden rests on the plaintiff to show there is a reasonable possibility that the proposed amendment will cure the defect (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318) by showing how the plaintiff can amend the complaint and how that amendment will change the legal effect of his or her pleadings. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The plaintiff may make this

necessary showing by submitting a proposed amended pleading as part of a motion to amend, or on motion for reconsideration, or by making the necessary showing on appeal. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386-1388.) Although Brittany P. requested leave to amend below, she did not submit a proposed pleading containing the allegations supporting a claim for punitive damages, either in connection with the request for leave to amend or by motion for reconsideration, and has not on appeal lodged a proposed pleading articulating how the new allegations might support a claim for punitive damages. Because there exists no proposed pleading showing a reasonable possibility that an amended complaint would state a claim (cf. *Baum v. Duckor, Spradling & Metzger* (1999) 72 Cal.App.4th 54, 73), Brittany P. has failed to show the trial court's secondary determination--that Brittany P. did not demonstrate the new facts gave rise to a viable punitive damages claim against Martinez--was an abuse of discretion.

Finally, the trial court concluded the motion, made on the eve of trial, was untimely and would prejudice SUHSD and Martinez. Although a trial court has discretion to permit amendments at any stage of the proceedings (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761), it is also clear that the "policy of great liberality in permitting amendments to the complaint at any stage of the proceedings . . . should be applied only '[w]here no prejudice is shown to the adverse party . . . .' [Citation.] A different result is indicated '[w]here inexcusable delay and probable prejudice to the opposing party' is shown. [Citation.]" (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.) Here, the court concluded the motion was untimely, and it is

clear prejudice would result in the form of incurring substantial new attorney fees to test the legal validity of the new allegations and to conduct additional discovery into the underlying factual allegations, as well as necessitating a substantial delay in the pending trial. (*Magpali*, at pp. 487-488.)

On this record, we cannot conclude the trial court exceeded the bounds of reason in denying Brittany P.'s 11th hour request to amend her complaint.

#### DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal.

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McDONALD, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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NARES, J.